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Supreme Court of the United States

OCTOBER TERM, 1957

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY
vs. *Appellants,*
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees,*
No. 465

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant,*
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees.*
No. 466

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF MARYLAND PORT AUTHORITY, BALTIMORE ASSOCIATION OF COMMERCE AND THE MAYOR AND CITY COUNCIL OF BALTIMORE, APPELLEES, IN OPPOSITION TO APPELLANTS' MOTION TO RECALL AND CLARIFY THE JUDGMENT

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The above-named appellees contend that the appellants' motion to recall and clarify this Court's judgment is an attempt to evade well-established limits on the jurisdiction

of this Court. The relief sought by the appellants is of the type obtainable, if at all, only by way of a direct appeal from the District Court's decree or by way of a timely motion for rehearing addressed to this Court. The time for taking either of such measures has already expired. In any event, the motion lacks merit for the reasons stated in the brief filed by the Baltimore and Ohio Railroad in opposition to the motion. We adopt that brief and endorse the argument there made.

STATEMENT

On October 1, 1956, the Interstate Commerce Commission entered an order approving certain railroad tariff schedules and disapproving others, all dealing with the shipment of imported iron ore from the Ports of New York, Philadelphia and Baltimore to seventeen points in so-called Central Territory. The effect of this order was to deprive Baltimore of the standard freight differential *vis-a-vis* New York and Philadelphia which had existed since 1877 and which had been repeatedly examined and approved by the Commission throughout the years. This result was accomplished by approving tariffs filed by the railroads serving New York and Philadelphia which disregarded the established differential while disapproving lower tariffs filed by certain of the railroads serving Baltimore which were designed to reinstate, at least partly, the differential.

Upon entry of the Commission's order, the Baltimore interests filed suit in the appropriate federal court to have it set aside to the extent that it approved the New York and Philadelphia tariffs and disapproved the Baltimore tariff. After extended hearings, the three judge District Court entered a decree on May 22, 1957 affirming the Commission's order insofar as it disapproved the Baltimore

tariff and vacating it to the extent that it approved the New York and Philadelphia tariffs.

For the reasons set forth in its opinion, the District Court: (1) held that essential findings necessary to support the Commission's approval of the Philadelphia tariff had not been made, (2) remanded the case to the Commission to make further findings and to reconsider the lawfulness of the Philadelphia rates in the light of such findings, (3) permitted the Philadelphia tariff to remain in effect pending such reconsideration by the Commission, and (4) enjoined the Commission from approving the New York tariff.

The New York and Philadelphia interests (including the parties making the present motion to recall) perfected an appeal to this Court. On the basis of the jurisdictional statements and motions, this Court entered a *per curiam* opinion and order dated December 9, 1957. It stated that, upon the remand of the case to the Commission, that body ought to be free to consider the interrelationship of the rates from New York with those from Baltimore and Philadelphia "and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship."

This Court, therefore, upheld the decision of the District Court that the New York and Philadelphia rates had not been shown to be lawful, but it directed the District Court to remand the New York rate to the Commission along with the Philadelphia rate and to make the terms of the remand broad enough to authorize the Commission to reconsider the relationship between all three ports and in the light of that reconsideration to take action upon the rates from each of the ports. This Court's opinion concludes with the statement that "so much of the decree of the District Court as did not affirm the order of the Commission is vacated, and

the cause is remanded for appropriate disposition not inconsistent with this opinion."*

No motion for rehearing or clarification of the order of this Court was filed by any of the parties to the appeal.

The parties then submitted to the District Court their respective versions of the form of decree that ought to be entered consistently with this Court's opinion and order, and on March 18, 1958, the District Court entered a decree remanding the cause to the Commission as to both the Philadelphia and New York rates. In addition, the District Court directed that pending the Commission's reconsideration the Philadelphia rate, which was already in effect, should remain in effect, but that the New York rate, which had never gone into effect, should not be permitted to become effective.

Thereafter, the appellants filed the present motion to recall and clarify the judgment on May 1, 1958 — nearly five months after the entry of this Court's order and some month and a half after the District Court, acting pursuant to the mandate, entered the outstanding decree of which the appellants complain but from which they failed to appeal. In support of their motion, the appellants urge, apparently in the alternative, (a) that the District Court's decree of March 18th is contrary to the "plain meaning" of this Court's order and judgment and (b) that the decree is, at least, contrary to the "necessary implication" of the order. In addition, a careful reading of the motion will disclose a semi-voiced third contention, namely, that even if the

* The District Court's decree had affirmed the Commission's disapproval of (1) the rates filed by the Baltimore carriers to re-establish, in part, the differential if the New York and Philadelphia rates should be approved and (2) the rates filed by the Philadelphia carriers to match these lower Baltimore rates. It is this portion of the District Court's decree which was left unmodified.

District Court's action is consistent with this Court's order, that order should be "clarified" so as to prohibit *nunc pro tunc* the District Court's attempt to maintain the *status quo* pending the Commission's further action on remand.

On this state of the record, we submit that the appellants are attempting to use a motion to recall as a means of collaterally attacking the lower court's decree. In support of that view and our contention that the motion should be denied we urge the following propositions:

(a) the appellants' contention that the lower court did not follow the mandate of the judgment of this Court can only be raised by a direct appeal from the decree complained of and no such appeal was taken within the time permitted by law;

(b) a motion to recall lies only to correct errors or jurisdictional faults in the judgment or mandate itself and cannot be used as a substitute for an appeal;

(c) the District Court's decree is in fact in strict conformity with this Court's order;

(d) the appellants cannot request a material change in an order of this Court except by way of a motion for rehearing and no such motion can be made at this time or at this stage of the proceedings.

ARGUMENT

I.

The District Court's Decree is Reviewable Only on Direct Appeal.

It has long been the rule that the actions of lower courts taken or purporting to have been taken pursuant to mandates of this Court are reviewable only by way of a

direct appeal from the order or decree complained of, or, in a proper case, by a writ of mandamus. *Re Potts*, 166 U. S. 263, 41 L. ed. 994; *Re Sanford Fork & Tool Company*, 160 U. S. 247, 40 L. ed. 414; *City National Bank v. Hunter*, 152 U. S. 512, 38 L. ed. 534. And a case, such as the present, where the matter complained of is the action of a three judge District Court pursuant to a remand from this Court in a case involving the I. C. C. is no exception to this rule. *Baltimore & Ohio Railroad Company v. United States*, 279 U. S. 781, 73 L. ed. 954.

This rule is applicable to the present case even though the District Court's decree staying the effectiveness of the New York tariff pending reconsideration by the Commission upon remand is not a final order since this Court has long held such an order to be an interlocutory injunction appealable under 28 U. S. C. 1253. In *United States v. United States Smelting, R. & M. Co.*, 339 U. S. 186, 94 L. ed. 750, the I. C. C. entered an order enjoining several railroads from performing certain switching and spotting services. On petition to a three judge District Court, it was held that the Commission's order was not supported by findings based upon competent evidence. Thereupon, the cause was remanded and the Commission temporarily enjoined from enforcing the original order. After remand, the Commission simply restated the ground for its action and reentered the original order, but took no further evidence. A second petition to the District Court resulted in the I. C. C. order being permanently enjoined. On appeal to this Court, the appellee contended that the appellant's failure to appeal the first decision of the District Court precluded an appeal from the second under the doctrine of the law of the case. In rejecting this contention this Court said (339 U. S. at 198-99):

"It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was in fieri. The Commission had a right on reconsideration to make a new record. Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 374, 375, 83 L. ed. 221, 230, 231, 59 S. Ct. 301. When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. 28 U. S. C. A. §1253, F. C. A. title 28, §1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case as it does for the kindred rule of res judicata."

In view of this well-established right to an appeal and the fact that the lower court did not *refuse* to act but entered a decree pursuant to the mandate, it would seem perfectly clear that a petition for mandamus would not be granted even if the same had been properly filed. *Ex Parte Fahey,* 332 U. S. 258, 91 L. ed. 2041; *Matter of Tiffany,* 252 U. S. 32, 64 L. ed. 443. The appellants' sole method of seeking a review of the lower court's decree is, therefore, by way of direct appeal.

Why the appellants failed to note an appeal within the thirty days permitted for appeals from interlocutory injunctions (28 U. S. C. 2101 (b)) must remain a matter of conjecture. However, it is perfectly clear that the appellants should not be permitted to take a belated appeal in the guise of a motion "to recall and clarify" this Court's judgment.

II.

A Motion to Recall Lies Only to Correct Errors or Jurisdictional Defects in the Judgment or Mandate Sought to be Recalled.

As we have seen, the appellants contend that the District Court entered a decree which they maintain is contrary to the mandate of this Court's judgment. There is not even the slightest suggestion that there is any error or jurisdictional defect in the order of this Court. And yet the presence of such an error or jurisdictional defect was the sole basis upon which motions to recall were granted in the relatively few cases in which such a procedure has been held proper.

Thus, motions to recall the judgment and mandate of this Court have been granted in cases where—

(a) this Court found that it lacked jurisdiction because of the collusive nature of the suit or otherwise. *Gardner v. Goodyear Co.*, 131 U. S. ciii App., 21 L. ed. 141; *Cannon v. United States*, 116 U. S. 55, 29 L. ed. 561.

(b) the judgment had been obtained by fraud of the successful litigant. *Shawkee Mfg. Co. v. Hartford-Empire Co.*, 322 U. S. 271, 88 L. ed. 1269.

(c) the judgment was entered under the mistaken assumption that the appellee had been notified of the appeal and was in default, whereas he had never been notified. *Ex Parte Crenshaw*, 15 Pet. 119, 10 L. ed. 682.

(d) the mandate is either inconsistent with the opinion or otherwise fails to give effect to the judgment. *Sibbald v. U. S.*, 12 Pet. 488, 9 L. ed. 1167; *Central National Bank v. Stevens*, 171 U. S. 108, 43 L. ed. 97.

(e) the mandate contained mere clerical errors or omissions. *Bank of Ky. v. Wistar*, 3 Pet. 431, 7 L. ed. 731; *Schell v. Dodge*, 107 U. S. 629, 27 L. ed. 601; *Killian v. Ebbinghaus*, 111 U. S. 798, 28 L. ed. 593.

(f) an appeal was erroneously dismissed prior to the time that it was actually docketed. *U. S. v. Gomez*, 23 How. 326, 16 L. ed. 552.

(g) the mandate erroneously remanded the case to the District Court instead of the Court of Appeals. *Palermo v. Luckenbach Steamship Co., Inc.*, 355 U. S. 910, 2 L. ed. 2d 3; *Cahill v. New York, N. H. & H. R. Co.*, 351 U. S. 183, 100 L. ed. 1075; *Boudoin v. Lykes Brothers Steamship Co., Inc.*, 350 U. S. 811, 100 L. ed. 727.

The appellants have failed to cite (and we to find) any case in which a motion to recall has been granted to review the action of a lower court taken or purporting to have been taken pursuant to a mandate of this Court. In fact, the only cases cited by the appellants in support of their novel procedure — *Cahill v. New York, N. H. & H. R. Co.*, *supra* and *Palermo v. Luckenback S. S. Co.*, *supra* — both dealt with cases where this Court erroneously remanded the cause to the District Court instead of the Court of Appeals, as can be seen from the above tabulation.

In short, a motion to recall has never been used to review the actions of a lower court and it must also be kept in mind that any such use, if permitted, would tend to disrupt the orderly procedure painstakingly established by the rules of this Court governing appeals.

III.

The District Court's Decree is in Strict Conformity With This Court's Order.

As has been pointed out, this Court's order vacating the District Court's original decree was based solely upon a determination that the Commission should be allowed to consider the relationship of the three ports in question and to enter such order with respect to all three as it found the interrelationship to require. The present decree of the District Court permits just that. It remands the cause to the Commission for reconsideration of both the New York and Philadelphia tariffs in light of this Court's order.

The appellants overlook the fact that this Court did not *reverse* the District Court; it did not hold the New York tariff to be lawful. On the contrary, this Court's order approved the District Court's original decree to the extent that it found that there was no substantial basis to support the Commission's finding that the New York rate was lawful. The only action of the District Court with which this Court disagreed was its failure to remand the New York tariff so that the Commission would be able to consider the entire relationship of the three ports and pass such *new* orders as it determined to be necessary. There is not the slightest indication in this Court's order that it intended to require the District Court to permit the New York tariff to become effective pending the I. C. C.'s determination.

Accordingly, it can readily be seen that the determination by the District Court in its second decree that the New York tariff should not go into effect was in no way inconsistent with the mandate. If the appellants felt aggrieved by the relief granted, they had the right to appeal.

However, inasmuch as they did not see fit to take a direct appeal from the decree, they should not be allowed to attack it collaterally by way of a strained construction of this Court's mandate and an argument that the District Court's decree is inconsistent with the mandate as so construed.

Realizing full well that the plain meaning of this Court's order directly refutes their "plain meaning" argument, the appellants resort to "necessary implication" as an alternative approach. Their argument on this point runs as follows: (a) this Court's order removed the Commission's order from further consideration of the District Court whose only remaining function was to act as a mere conduit for the transmission of the cause back to the Commission; (b) having been thus deprived of jurisdiction over the I. C. C. order, the District Court was without jurisdiction to enjoin the tariff inasmuch as the power to so enjoin can not be exercised "apart from the jurisdiction to enjoin a Commission order"; (c) this Court would never pass an order which would permit the District Court to exceed its jurisdiction; (d) therefore this Court's order (or, we suppose, its "necessary implication") must be construed so as to prohibit the District Court from staying the effectiveness of the New York tariff.

To this argument there are numerous answers; we will discuss but two*.

First. Although argued as if the appellant's real contention were that the lower court's action was contrary

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* It is pointed out in the brief in opposition filed by the Baltimore & Ohio Railroad (pp. 7-12) that the District Court does in fact have jurisdiction to stay the effectiveness of a tariff pending reconsideration by the Commission after a remand. As previously noted, we adopt the argument of the B. & O.

to this Court's mandate, it is perfectly clear that the essence of the argument is that the District Court lacked jurisdiction to maintain the *status quo* pending reconsideration of the Commission pursuant to the remand. Even if this contention had merit, it obviously can not be made in the present proceeding.

The District Court had jurisdiction of the parties and the general subject matter, i. e. suits to set aside and enjoin orders of the I. C. C. This being the case, even if a particular action which it took was beyond its jurisdiction the decree can not be collaterally attacked; it is binding on all parties until set aside on direct appeal. *Chicot Co. Drainage Dist. v. Baxter State Bank,* 308 U. S. 371, 84 L. ed. 329; *Stoll v. Gottlieb,* 305 U. S. 165, 83 L. ed. 104. As we have seen, the appellants failed to appeal from the decree within the thirty days allowed by law and are therefore bound by the decree and prevented from attacking it in the collateral manner now attempted.

Second. This Court's order did not relegate the District Court to the status of a mere mail chute. It did not prevent the lower court from taking any further "judicial action". On the contrary, all that it did was (1) vacate the decree so as to allow the Commission to reconsider the New York tariff in light of the relationship between the three ports and (2) remand the case "for appropriate disposition not inconsistent" with the order. Hence even if it be assumed that a federal court has no power to enjoin the effectiveness of a tariff "apart from the jurisdiction to enjoin a Commission order" it is obvious that the Commission's order was still "before the District Court" when it entered its staying order. The appellant's own test of jurisdiction is thus satisfied.

IV.

No Rehearing is Available at This Time or at This Stage of the Proceedings.

Even a cursory reading of the motion to recall will disclose one inescapable fact: the appellants' real complaint is not that the District Court acted contrary to this Court's order, but rather that this Court's order did not embody all the provisions which they would have liked to see incorporated in it. They would not have been content to remand the matter to the District Court for appropriate disposition — as this Court did. They would have entered an order which would have stripped the District Court of all discretion as to the formulation of specific equitable relief and would have prevented the lower court from using its power to maintain the *status quo* pending the further decision of the Commission. However, the mere fact that the appellants suppose "that, in view of the conclusion to which the court came, as expressed in the opinion, it ought to have entered a different decree from that which it saw fit to enter", affords no ground for the issuance of a motion to recall. *Elizabeth v. American Nicholson Pavement Co.*, 131 U. S. cxlviii App., 24 L. ed. 1059.

If the appellants were dissatisfied with the scope of the relief granted by this Court, Supreme Court Rule 58 gave them the right to file a petition for rehearing within 25 days after the entry of the order. No such petition was filed. Instead, the appellants waited until after the 25 days had expired, until after the lower court had acted pursuant to this Court's order, and even until after the time for appeal from the lower court's decree had expired, and only then did they file the present motion. We do not suggest that there are no cases in which a rehearing should be granted after the expiration of the 25 day period. We do, however, most strenously maintain that no such

rehearing should be granted in this case — regardless of the guise in which such a motion is made. For this Court has specifically held that no rehearing can be granted after remand to the lower court. *Peck v. Sanderson*, 18 How. 42, 15 L. ed. 262; *Browder v. M'Arthur*, 7 Wheat. 59, 5 L. ed. 397; *Sibbald v. U. S.*, 12 Pet. 488, 9 L. ed. 1167.

CONCLUSION

Unless orderly appellate procedure is to be disregarded, motions which collaterally attack lower court judgments must be denied. Appellants should not be encouraged to speculate on whether they can convince a lower court to enter a decree more favorable than that actually permitted by this Court's mandate and, if they fail, be allowed to obtain what is in essence a rehearing in an effort to broaden the mandate in their favor. In short, we submit that the appellants are time-barred from invoking any procedure for obtaining appellate review and should not be allowed to achieve the same result by way of indirection.

Respectfully submitted,

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